EXEMPTION 3

Finally, under the Freedom of Information Reform Act of 1986,[114] many of the materials previously protectible only on a "high 2" basis may be protectible also under Exemption 7(E).[115] Several post-amendment cases have held such information to be exempt from disclosure under both Exemption 2 and Exemption 7(E).[116] While Exemption 2 must still be used if any information fails to meet Exemption 7's "law enforcement" threshold, Exemption 2's history and judicial interpretations should be helpful in applying Exemption 7(E). (See discussion of Exemption 7(E), below.)

EXEMPTION 3

Exemption 3 of the FOIA incorporates the disclosure prohibitions that are contained in various other federal statutes. As originally enacted in 1966, Exemption 3 was broadly phrased so as to simply cover information "specifically exempted from disclosure by statute."[1] Nearly a decade later, in FAA v. Robertson, the Supreme Court interpreted this language as evincing a congressional intent to allow statutes which permitted the withholding of confidential information, and which were enacted prior to the FOIA, to remain unaffected by the disclosure mandate of the FOIA; it accordingly held that a very broad withholding provision in the Federal Aviation Act which delegated almost unlimited discretion to agency officials to withhold specific documents in the "interest of the pub-

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[114] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48, 3207-49 (codified as amended at 5 U.S.C. § 552(b)(2) (1994)).

[115] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 16-17 & n.32 (Dec. 1987); see also Kaganove, 856 F.2d at 888-89; Hardy v. FBI, No. 95-883, slip op. at 12 n.2 (D. Ariz. July 29, 1997) (finding "unnecessary" separate Exemption 2 analysis for documents protected by Exemption (7)(E)); Berg, No. 93-C6741, slip op. at 10 n.2 (N.D. Ill. June 23, 1994) ("[I]t would appear that exemption (b)(7)(E) is essentially a codification of the `high 2' exemption.").

[116] See, e.g., PHE, 983 F.2d at 251 (release of "who would be interviewed, what could be asked, and what records or other documents would be reviewed" in FBI investigatory guidelines would risk circumvention of law); Voinche, 940 F. Supp. at 328, 331 (approving nondisclosure of information relating to security of Supreme Court building on basis of both Exemptions 2 and 7(E)); Silber, No. 91-876, transcript at 21 (D.D.C. Aug. 13, 1992) (disclosure of agency litigation tactics and strategy would create a significant risk of circumvention of agency regulations by enhancing adversary's posture); Williston Basin, No. 88-592, slip op. at 4-5 (D.D.C. Apr. 17, 1989) (identities of auditors, "purpose, source and conclusion" portions of audit reports and section abstracts consisting of auditors' discussions of investigative techniques); O'Connor, 698 F. Supp. at 206-07 (-memorandum containing criteria used internally by IRS in conducting investigations).

[1] Pub. L. No. 89-487, 80 Stat. 250, 251 (1966) (subsequently amended).

lic" was incorporated within Exemption 3.[2] Fearing that this interpretation could allow agencies to evade the FOIA's disclosure intent, Congress in effect overruled the Supreme Court's decision by amending Exemption 3 in 1976.[3]

As amended, Exemption 3 allows the withholding of information prohibited from disclosure by another statute only if one of two disjunctive requirements are met: the statute either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."[4] A statute thus falls within the exemption's coverage if it satisfies any one of its disjunctive requirements.[5]

Initial Considerations

The Court of Appeals for the District of Columbia Circuit has held that records may be withheld under the authority of another statute pursuant to Exemption 3 "if--and only if--that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure."[6] The D.C. Circuit emphasized that:

> a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure. We must find a congressional purpose in the actual words of the statute (or at

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[2] 422 U.S. 255, 266 (1975).

[3] See Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976) (single FOIA amendment enacted together with Government in the Sunshine Act in 1976); see also FOIA Update, Spring 1994, at 6 (connecting disclosure policies of Government in the Sunshine Act and FOIA).

[4] 5 U.S.C. § 552(b)(3) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997) (emphasis added).

[5] See American Jewish Congress v. Kreps, 574 F.2d 624, 628 (D.C. Cir. 1978); see also Long v. IRS, 742 F.2d 1173, 1178 (9th Cir. 1984); Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979). See generally 5 U.S.C.A. § 552(e)(1)(A)(ii) (provision of Electronic Freedom of Information Act Amendments of 1996 requiring agencies to list Exemption 3 statutes upon which they rely each year in their annual FOIA reports, beginning with reports for fiscal year 1998); FOIA Update, Summer 1997, at 5 (annual FOIA report guidelines issued by Department of Justice).

[6] Reporters Comm. for Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730, 734 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989); see also Cal-Almond, Inc. v. USDA, 960 F.2d 105, 108 (9th Cir. 1992) (concluding that language must specifically prohibit disclosure, not merely prohibit expenditure of funds used in releasing information).

> least in the legislative history of FOIA)--not in the legislative history of the claimed withholding statute, nor in an agency's interpretation of the statute.[7]

That is not to say that the breadth and reach of the disclosure prohibition must be found on the face of the statute, but that the statute must at least "explicitly deal with public disclosure."[8] (Previously, the D.C. Circuit had found legislative history probative on the issue of whether an enactment was intended to serve as a withholding statute within the meaning of Exemption 3.[9]) In any event, though, the legislative history of a newly enacted Exemption 3 statute may be considered in determining whether the statute is applicable to matters that are already pending.[10]

Exemption 3 generally is triggered only by federal statutes.[11] Federal rules of procedure, which are promulgated by the Supreme Court, ordinarily do not qualify under Exemption 3.[12] However, when a rule of procedure is subsequently modified and thereby specifically enacted into law by Congress, it may qualify under the exemption.[13] While the issue of whether a treaty can qualify as a statute

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[7] Reporters Comm., 816 F.2d at 735; see also Anderson v. HHS, 907 F.2d 936, 951 n.19 (10th Cir. 1990) (holding that agency interpretation of statute not entitled to deference in determining whether statute qualifies under Exemption 3). But see Meyerhoff v. EPA, 958 F.2d 1498, 1501-02 (9th Cir. 1992) (looking to legislative history of withholding statute to determine that statutory amendment clarified rather than changed it).

[8] Reporters Comm., 816 F.2d at 736; see, e.g., Cal-Almond, 960 F.2d at 108 (finding disclosure prohibition sought to be effectuated through appropriations limitation inadequate under Exemption 3); Belvy v. United States Dep't of Justice, No. 94-923, slip op. at 9-11 (S.D. Fla. Dec. 15, 1994) (determining that statute providing that exclusion hearings be "separate and apart from the public" does not explicitly forbid disclosure of asylum decisions emanating from those proceedings).

[9] See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1284 (D.C. Cir. 1983).

[10] See Long v. IRS, 742 F.2d 1173, 1183-84 (9th Cir. 1984).

[11] See Washington Post Co. v. HHS, 2 Gov't Disclosure Serv. (P-H) ¶ 81,047, at 81,127 n.2 (D.D.C. Dec. 4, 1980) ("[A]n Executive Order . . . is clearly inadequate to support reliance on exemption 3."), rev'd on other grounds, 690 F.2d 252 (D.C. Cir. 1982).

[12] See Founding Church of Scientology v. Bell, 603 F.2d 945, 952 (D.C. Cir. 1979) (holding that Rule 26(c) of Federal Rules of Civil Procedure, governing issuance of protective orders, is not statute under Exemption 3).

[13] See, e.g., Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981) (concluding that Rule 6(e) of the

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under Exemption 3 has not yet been ruled on in any FOIA case, there is a sound policy basis for concluding that a treaty can so qualify.[14]

Once it is established that a statute is a nondisclosure statute and that it meets at least one of the disjunctive requirements of Exemption 3, an agency must also establish that the records in question fall within the withholding provision of the nondisclosure statute.[15] This, in turn, will often require an interpretation of the nondisclosure statute.[16] Courts have been somewhat divided over whether to construe the withholding criteria of the nondisclosure statute narrowly, consistent with the strong disclosure policies specifically embodied in the FOIA,[17] or broadly, pursuant to deferential standards of general administrative law.[18]

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[13](...continued)
Federal Rules of Criminal Procedure, regulating disclosure of matters occurring before a grand jury, satisfies Exemption 3's "statute" requirement because it was specially amended by Congress in 1977); Berry v. Department of Justice, 612 F. Supp. 45, 49 (D. Ariz. 1985) (determining that Rule 32 of the Federal Rules of Criminal Procedure, governing disclosure of presentence reports, is "statute" for Exemption 3 purposes as it was affirmatively enacted into law by Congress in 1975).

[14] Cf. Whitney v. Robertson, 124 U.S. 190, 194 (1887) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation."); Public Citizen v. Office of the United States Trade Representative, 804 F. Supp. 385, 388 (D.D.C. 1992) (stating that trade agreement not ratified by Senate does not have status of "statutory law" and thus does not provide Exemption 3 protection).

[15] See A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 143 (2d Cir. 1994), on remand, No. 92-CV-603 (D. Conn. Mar. 8, 1995); see also Public Citizen Health Research Group, 704 F.2d at 1284; Fund for Constitutional Gov't, 656 F.2d at 868; Goland v. CIA, 607 F.2d 339, 350 (D.C. Cir. 1978); Chesapeake Bay Found. v. USDA, 917 F. Supp. 64, 66 (D.D.C. 1996), rev'd on other grounds, 108 F.3d 375 (D.C. Cir. 1997); DeLorme Publ'g Co. v. NOAA, 917 F. Supp. 867, 870-71 (D. Me. 1996), appeal dismissed per stipulation, No. 96-1601 (1st Cir. July 8, 1996).

[16] See A. Michael's Piano, 18 F.3d at 143-45 (interpreting section 21(f) of FTC Act, 15 U.S.C. § 57b-2(f) (1994)); see also Aronson v. IRS, 973 F.2d 962, 965-66 (1st Cir. 1992); Anderson v. HHS, 907 F.2d 936, 950-51 (10th Cir. 1990); Grasso v. IRS, 785 F.2d 70, 74-75 (5th Cir. 1984); Currie v. IRS, 704 F.2d 523, 526-27 (11th Cir. 1983).

[17] See Anderson, 907 F.2d at 951; Grasso, 785 F.2d at 75; Currie, 704 F.2d at 526-27; DeLorme Publ'g, 917 F. Supp. at 870-71.

[18] See Church of Scientology Int'l v. United States Dep't of Justice, 30 F.3d 224, 235 (1st Cir. 1994); Aronson, 973 F.2d at 967; White v. IRS, 707 F.2d 897, 900-01 (6th Cir. 1983) (holding that agency determination that documents in dispute fell within withholding provision of Internal Revenue Code was "neither
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Most recently, the Court of Appeals for the Second Circuit observed that "the Supreme Court has never applied a rule of [either] narrow or deferential construction to withholding statutes."[19] Consequently, it adopted a pragmatic, and essentially neutral, stance regarding interpretation of Exemption 3 statutes, "looking to the plain language of the statute and its legislative history, in order to determine legislative purpose."[20]

With respect to subpart (B) statutes--which permit agencies some discretion to withhold or disclose records--review under the FOIA of agency action is limited to the determination that the withholding statute qualifies as an Exemption 3 statute and that the records fall within the statute's scope.[21] Beyond this determination, the agency's exercise of its discretion under the withholding statute is governed not by the FOIA, but by the withholding statute itself;[22] judicial review of that should not be within the FOIA's jurisdiction.[23]

Subpart (A)

Many statutes have been held to qualify as Exemption 3 statutes under the exemption's first subpart--which encompasses statutes that require information to be withheld and leave the agency no discretion on the issue. A primary example is Rule 6(e) of the Federal Rules of Criminal Procedure,[24] which regulates disclosure of matters occurring before a grand jury and which satisfies the basic "statute" requirement of Exemption 3 because it was specially amended by Con-

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[18](...continued)
arbitrary nor capricious"). But see DeLorme Publ'g, 917 F. Supp. at 871 (rejecting deferential review when statute at issue "ha[d] broad application and ha[d] been implemented by more than a dozen agencies").

[19] A. Michael's Piano, 18 F.3d at 144.

[20] Id.

[21] See Aronson, 973 F.2d at 967; Association of Retired R.R. Workers v. United States R.R. Retirement Bd., 830 F.2d 331, 335 (D.C. Cir. 1987). But see Long, 742 F.2d at 1181; DeLorme Publ'g, 917 F. Supp. at 871.

[22] See Aronson, 973 F.2d at 966; Association of Retired R.R. Workers, 830 F.2d at 336.

[23] Cf. Roley v. Assistant Attorney Gen., No. 89-2774, slip op. at 8 (D.D.C. Mar. 9, 1990) (determining that court's grant of permission to disclose grand jury records pursuant to Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure does not govern disposition of same records in FOIA suit); Garside v. Webster, 733 F. Supp. 1142, 1147 (S.D. Ohio 1989) (same). But cf. DeLorme Publ'g, 917 F. Supp. at 871 (proceeding de novo when statute at issue was administered by numerous federal agencies); Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992) (holding that disclosure order issued by court pursuant to 38 U.S.C. § 7332(b) (1994) requires VA to disclose records under FOIA).

[24] Fed. R. Crim. P. 6(e).

gress in 1977.[25] It is well established that "Rule 6(e) embodies a broad sweeping policy of preserving the secrecy of grand jury material regardless of the substance in which the material is contained."[26] However, defining the parameters of Rule 6(e) protection is not always a simple task and has been the subject of much litigation. In Fund for Constitutional Government v. National Archives & Records Service, the Court of Appeals for the District of Columbia Circuit stated that the scope of the secrecy that must be afforded grand jury material "is necessarily broad" and, consequently, that "it encompasses not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal the `identities of witnesses or jurors, the substance of the testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like.'"[27]

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[25] See Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981); see also Watson v. United States Dep't of Justice, 799 F. Supp. 193, 195 (D.D.C. 1992).

[26] Iglesias v. CIA, 525 F. Supp. 547, 556 (D.D.C. 1981).

[27] 656 F.2d at 869 (quoting SEC v. Dresser Indus., 628 F.2d 1368, 1382 (D.C. Cir. 1980)); see also Church of Scientology Int'l v. United States Dep't of Justice, 30 F.3d 224, 235 (1st Cir. 1994) ("[D]ocuments identified as grand jury exhibits, and whose contents are testimonial in nature or otherwise directly associated with the grand jury process, such as affidavits and deposition transcripts, ordinarily may be withheld simply on the basis of their status as exhibits."); McDonnell v. United States, 4 F.3d 1227, 1246 (3d Cir. 1993) ("[i]nformation and records presented to a federal grand jury . . . names of individuals subpoenaed . . . federal grand jury transcripts of testimony" protected); Silets v. United States Dep't of Justice, 945 F.2d 227, 230 (7th Cir. 1991) (concluding that "identity of witness before grand jury and discussion of that witness's testimony . . . falls squarely within" Rule 6(e)'s prohibition); Sousa v. United States Dep't of Justice, No. 95-375, 1997 U.S. Dist. LEXIS 9010, at **10-11 (D.D.C. June 19, 1997) (finding that disclosure of grand jury witness subpoenas, AUSA's handwritten notes discussing content of witness testimony, evidence used, and AUSA's strategies would reveal protected aspect of grand jury investigation); Twist v. Reno, No. 95-258, 1997 U.S. Dist. LEXIS 8981, at *5 n.1 (D.D.C. May 12, 1997) (holding that agency properly withheld information that would reveal strategy or direction of grand jury investigation even though requester was previously on investigation team and had seen some of withheld information) (appeal pending); Jimenez v. FBI, 938 F. Supp. 21, 28 (D.D.C. 1996) (protecting notes written by AUSA in preparation for grand jury proceeding, records of third parties provided in course of proceeding, and notes concerning witnesses who testified); Voinche v. FBI, 940 F. Supp. 323, 329 (D.D.C. 1996) (holding that agency properly withheld name of witness subpoenaed to appear before grand jury, as well as time, place, and particular case), aff'd per curiam on other grounds, No. 96-5304, 1997 U.S. App. LEXIS 19089 (D.C. Cir. June 19, 1997), petition for cert. filed, 66 U.S.L.W. 3178 (U.S. Sept. 2, 1997) (No. 97-383); Spannaus v. United States Dep't of Justice, No. 92-372, slip op. at 7-8 (D.D.C. June 20, 1995) (permitting information identifying grand jury witnesses and testimony to be withheld, where

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However, in its scrutiny of the scope of Rule 6(e) in Senate of Puerto Rico v. United States Department of Justice,[28] the D.C. Circuit firmly held that neither the fact that information was obtained pursuant to a grand jury subpoena, nor the fact that the information was submitted to the grand jury, is sufficient, in and of itself, to warrant the conclusion that disclosure is necessarily prohibited by Rule 6(e).[29] Rather, an agency must establish a nexus between the release of that information and "revelation of a protected aspect of the grand jury's investigation."[30] This requirement is particularly applicable to "extrin

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[27](...continued)
plaintiff produced lists of news articles alleging much of information in public domain, but failed to point to specific prior disclosures); Canning v. United States Dep't of Justice, No. 92-0463, slip op. at 6 (D.D.C. June 26, 1995) (protecting "material that, while not directly mentioning the grand jury," nevertheless mentions witness names and describes witness testimony); Helmsley v. United States Dep't of Justice, No. 90-2413, slip op. at 4-6 (D.D.C. Sept. 25, 1992) (records
identifying witnesses who testified or were consulted, documents and evidence not presented, but obtained through grand jury subpoenas, immunity applications and orders, exhibit lists, reports and memoranda discussing evidence, correspondence regarding compliance with subpoenas, documents, notes and research relating to litigation regarding compliance with subpoenas, and letters among lawyers discussing grand jury proceedings, all protected by Rule 6(e)).

[28] 823 F.2d 574 (D.C. Cir. 1987).

[29] Id. at 584; see Washington Post Co. v. United States Dep't of Justice, 863 F.2d 96, 100 (D.C. Cir. 1988) (same); see also John Doe Corp. v. John Doe Agency, 850 F.2d 105, 109 (2d Cir. 1988) ("A document that is otherwise available to the public does not become confidential simply because it is before a grand jury."), rev'd on other grounds, 493 U.S. 146 (1989); Isley v. Executive Office for United States Attorneys, No. 96-0123, slip op. at 2-4 (D.D.C. Mar. 27, 1997) (ordering agency to provide further justification for withholding "transcripts, subpoenas, information provided in response to a grand jury subpoena, and information identifying who testified before a grand jury"), appeal dismissed, No. 97-5105 (D.C. Cir. Sept. 8, 1997); Butler v. United States Dep't of Justice, No. 86-2255 (D.D.C. Feb. 3, 1994) (holding descriptions of documents subpoenaed by grand jury not protected under Rule 6(e)), appeal dismissed, No. 94-5078 (D.C. Cir. Sept. 8, 1994); Astley v. Lawson, No. 89-2806, slip op. at 3-4 (D.D.C. Jan. 11, 1991) (ordering release of documents even though requester might have been able to deduce purpose for which records were subpoenaed, because records on their face did not reveal inner workings of grand jury).

[30] Senate of P.R., 823 F.2d at 584; see also Karu v. United States Dep't of Justice, No. 86-771, slip op. at 4-5 (D.D.C. Dec. 1, 1987) (finding nexus established because "[w]ere this information to be released the very substance of the grand jury proceedings would be discernible"). But see Isley, No. 96-0123, slip op. at 4 (D.D.C. Mar. 27, 1997) (concluding agency "has not sufficiently linked the exemption to the contents of the withheld documents"); LaRouche v.
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sic" documents that were created entirely independent of the grand jury process; for such a document, the D.C. Circuit emphasized in Washington Post Co. v. United States Department of Justice, the required nexus must be apparent from the information itself and "the government cannot immunize [it] by publicizing the link."[31] As a general rule, an agency must be able to adequately document and support its argument that disclosure of the record in question would reveal a secret aspect of the grand jury proceeding.[32]

A more recent, odd decision by the Court of Appeals for the First Circuit, Church of Scientology International v. United States Department of Justice, further clouds the precise contours of Rule 6(e).[33] Initially following Senate of Puerto Rico, the First Circuit rejected a position that the secrecy concerns protected by Rule 6(e) are automatically implicated for any materials "simply located in

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[30](...continued)
United States Dep't of Justice, No. 90-2753, slip op. at 9-10 (D.D.C. June 24, 1993) (holding that letter prepared by government attorney discussing upcoming grand jury proceedings did reveal inner workings of grand jury).

[31] 863 F.2d at 100.

[32] See, e.g., Isley, No. 96-0123, slip op. at 3 (D.D.C. Mar. 27, 1997) (finding agency's Exemption 3 claim "too sweeping" and ordering agency to provide detailed explanation or produce the documents); Kronberg v. United States Dep't of Justice, 875 F. Supp. 861, 867-68 (D.D.C. 1995) (ordering grand jury material released where prior disclosure was made to defense counsel and where government had not met burden of demonstrating that disclosure would reveal inner workings of grand jury); Linn v. United States Dep't of Justice, No. 92-1406, slip op. at 15-16 (D.D.C. June 6, 1995) ("[N]owhere in its affidavit does the DEA specifically link this exemption to the contents of the documents being withheld," but rather "merely states that it applied this exemption to withhold information that names witnesses and recounts testimony given to a federal grand jury."); Crooker v. IRS, No. 94-0755, 1995 WL 430605, at *2 (D.D.C. Apr. 27, 1995) (requiring IRS to "further clarify and identify with particularity, how disclosure of grand jury exhibits would disclose a protected aspect of the grand jury's investigation"); Canning v. United States Dep't of Justice, 919 F. Supp. 451, 454-55 (D.D.C. 1994) (requiring government to produce affidavits "showing a basis for knowledge that the information came from grand jury" and explain how material is protected under Rule 6(e)), summary judgment granted, No. 92-0463, slip op. at 4 (D.D.C. June 26, 1995) (finding that FOIA officers are among those with approved access to grand jury-protected information, and that FOIA officer personally reviewed withheld documents (citing Federal Grand Jury Practice 173 (Jan. 1993))); cf. Sousa, 1997 U.S. Dist. LEXIS 9010, at **10-11 (holding that supplemental Vaughn Index adequately demonstrated that disclosure of grand jury witness subpoenas, AUSA's handwritten notes discussing content of witness testimony, evidence used, and AUSA's strategies would reveal protected aspects of grand jury investigation).

[33] 30 F.3d at 235-36.

grand jury files."[34] Nevertheless, apparently operating under the premise that all grand jury exhibits constitute materials actually presented to the grand jurors, it further specified that, even with regard to "extrinsic documents," it would be "reasonable for an agency to withhold any document containing a grand jury exhibit sticker or that is otherwise explicitly identified on its face as a grand jury exhibit, as release of such documents reasonably could be viewed as revealing the focus of the grand jury investigation."[35] Thus, the First Circuit has seemingly placed itself in at least some degree of conflict with the D.C. Circuit's Senate of Puerto Rico interpretation of the grand jury rule.[36]

The Court of Appeals for the Ninth Circuit has held that a provision of the Ethics in Government Act of 1978,[37] protecting the financial disclosure reports of special government employees, meets the requirements of subpart (A).[38] While not actually distinguishing between the two subparts of Exemption 3, the Supreme Court in Baldrige v. Shapiro,[39] held that the Census Act[40] is an Exemption 3 statute because it requires that certain data be withheld in such a manner as to leave the Census Bureau with no discretion whatsoever.[41]

Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964[42] have also been held to meet the subpart (A) requirement because they allow the EEOC no discretion to publicly disclose matters pending before the Commis-

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[34] Id. at 236.

[35] Id. at 235 n.15 (dictum); cf. Foster v. United States Dep't of Justice, 933 F. Supp. 687, 691 (E.D. Mich. 1996) (protecting "final prosecution report" when "[e]ach page containe[d] a `grand jury' secrecy label").

[36] See Senate of P.R., 823 F.2d at 584; see also Crooker, 1995 WL 430605, at *9 n.2 (withholding documents on basis of grand jury exhibit labels "appears to be the type of per se withholding of grand jury material expressly rejected by the D.C. Circuit.").

[37] 5 U.S.C. app. § 107 (1994).

[38] Meyerhoff v. EPA, 958 F.2d 1498, 1502 (9th Cir. 1992) (construing 1978 version of statute). But see Church of Scientology v. IRS, 816 F. Supp. 1138, 1152 (W.D. Tex. 1993) (implying that Ethics in Government Act is subpart (B) Exemption 3 statute because FOIA disclosure can be made only if requester meets statute's disclosure requirements), appeal dismissed per stipulation, No. 93-8431 (5th Cir. Oct. 21, 1993).

[39] 455 U.S. 345 (1982).

[40] 13 U.S.C. §§ 8(b), 9(a) (1994).

[41] 455 U.S. at 355.

[42] 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (1994).

sion.[43] Similarly, the statute governing records pertaining to Currency Transaction Reports[44] has been found to meet the requirements of subpart (A).[45] The International Investment Survey Act of 1976[46] has been held to be a subpart (A) statute[47] and certain portions of the overall public disclosure provisions of the Consumer Product Safety Act[48] likewise have been found to amply satisfy subpart (A)'s nondisclosure requirements.[49]

Additionally, the Hart-Scott-Rodino Antitrust Improvement Amendments to the Clayton Antitrust Act,[50] which prohibit disclosure of premerger notification materials submitted to the Department of Justice or the Federal Trade Commission, have been held to qualify as a subpart (A) statute,[51] as has a provision of the Antitrust Civil Process Act,[52] which explicitly exempts from the FOIA transcripts of oral testimony taken in the course of investigations under that Act.[53] Likewise, a provision of the Independent Counsel Reauthorization Act[54] has been considered to qualify under Exemption 3, as it leaves the Department of Justice and the Independent Counsel with no discretion to disclose materials supplied to the division of the court.[55]

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[43] See Frito-Lay v. EEOC, 964 F. Supp. 236, 239-43 (W.D. Ky. 1997); American Centennial Ins. Co. v. EEOC, 722 F. Supp. 180, 183 (D.N.J. 1989).

[44] 31 U.S.C. § 5319 (1994).

[45] See Linn v. United States Dep't of Justice, No. 92-1406, slip op. at 63 (D.D.C. Aug. 22, 1995); Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992); Vennes v. IRS, No. 5-88-36, slip op. at 6 (D. Minn. Oct. 14, 1988), aff'd, 890 F.2d 419 (8th Cir. 1989) (unpublished table decision).

[46] 22 U.S.C. § 3104(c) (1994).

[47] See Young Conservative Found. v. United States Dep't of Commerce, No. 85-3982, slip op. at 10-11 (D.D.C. Mar. 25, 1987).

[48] 15 U.S.C. § 2055(a)(2) (1994).

[49] See Mulloy v. Consumer Prod. Safety Comm'n, No. C-2-85-645, slip op. at 2-4 (S.D. Ohio Aug. 2, 1985).

[50] 15 U.S.C. § 18a(h) (1994).

[51] See Lieberman v. FTC, 771 F.2d 32, 38 (2d Cir. 1985); Mattox v. FTC, 752 F.2d 116, 121 (5th Cir. 1985).

[52] 15 U.S.C. § 1314(g) (1994).

[53] See Motion Picture Ass'n of America v. United States Dep't of Justice, No. 80 Civ. 6612, slip op. at 1 (S.D.N.Y. Oct. 6, 1981).

[54] 28 U.S.C. § 592(e) (1994).

[55] Cf. Public Citizen v. Department of Justice, No. 82-2909 (D.D.C. May 18, 1983) (construing 1978 version of statute).

Also, a section of the Transportation Safety Act of 1974,[56] which states that the National Safety Transportation Board shall withhold from public disclosure cockpit voice recordings associated with accident investigations, was found to fall within subsection (A) of Exemption 3.[57] Similarly, information contained in the Social Security Administration's "Numident system," which was obtained from death certificates provided by state agencies, has been held exempt on the basis of subpart (A) on the grounds that the language of the statute[58] "leaves no room for agency discretion."[59]

In a decision construing the application of the identical Exemption 3 language of the Government in the Sunshine Act[60] to the Defense Nuclear Facilities Safety Board Act[61] the D.C. Circuit has held that the latter statute allows no discretion with regard to the release of the Board's proposed recommendations, thus meeting the requirement of subpart (A).[62] By contrast, the D.C. Circuit found that the statute governing release by the FBI of criminal record information ("rap sheets")[63] fails to fulfill subpart (A)'s requirement of absolute withholding because the statute implies that the FBI has discretion to withhold records and, in fact, the FBI had exercised such discretion by its inconsistent manner of releasing "rap sheets" to the public.[64]

In an extraordinary decision, the Ninth Circuit held that language in an appropriations act specifying that "[n]one of the funds provided in this Act may be expended to release information acquired from any handler" under a particular

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[56] 49 U.S.C. § 1114 (1994).

[57] McGilvra v. National Transp. Safety Bd., 840 F. Supp. 100, 102 (D. Colo. 1993).

[58] 42 U.S.C. § 405(r) (1994).

[59] International Diatomite Producers Ass'n v. United States Soc. Sec. Admin., No. C-92-1634, slip op. at 8-9 (N.D. Cal. Apr. 28, 1993), appeal dismissed per stipulation, No. 93-16204 (9th Cir. Oct. 27, 1993).

[60] 5 U.S.C. § 552b (1994).

[61] 42 U.S.C. § 2286 (1994).

[62] Natural Resources Defense Council v. Defense Nuclear Facilities Safety Bd., 969 F.2d 1248, 1249 (D.C. Cir. 1992).

[63] 28 U.S.C. § 534 (1994).

[64] See Reporters Comm. for Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730, 736 n.9 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989); see also Dayton Newspapers, Inc. v. FBI, No. C-3-85-815, slip op. at 6 (S.D. Ohio Feb. 9, 1993).

agricultural program,[65] does not satisfy the requirement of subpart (A) because through such language Congress prohibited only "the expenditure of funds" for releasing the information, not release of the information under the FOIA itself.[66]

Subpart (B)

Most Exemption 3 cases involve subpart (B)--which encompasses statutes that either provide criteria for withholding information or refer to particular matters to be withheld--either explicitly or implicitly. For example, a provision of the Consumer Product Safety Act[67] has been held to set forth sufficiently definite withholding criteria for it to fall within the scope of subpart (B),[68] and the provision which prohibits the Commission from disclosing any information that is submitted to it pursuant to section 15(b) of the Act[69] has been held to meet the requirements of subpart (B) by referring to particular types of matters to be withheld.[70]

Section 777 of the Tariff Act,[71] governing the withholding of "proprietary information," has been held to refer to particular types of information to be withheld and thus to be a subpart (B) statute.[72] Section 12(d) of the Railroad Unemployment Insurance Act[73] refers to particular types of matters to be withheld--information which would reveal employees' identities--and thus has been held to satisfy subpart (B).[74]

Similarly, it has been held that section 12(c)(1) of the Export Administra-

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[65] Rural Development, Agriculture and Related Agencies Appropriations Act of 1989, Pub. L. No. 100-460, § 630, 102 Stat. 2229, 2262.

[66] Cal-Almond, Inc. v. USDA, 960 F.2d 105, 108 (9th Cir. 1992).

[67] 15 U.S.C. § 2055(b)(1) (1994).

[68] See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 122 (1980).

[69] 15 U.S.C. § 2055(b)(5) (1994).

[70] See Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, No. 87-1478, slip op. at 16-17 (D.D.C. Sept. 19, 1989).

[71] 19 U.S.C. § 1677f (1994).

[72] See Mudge Rose Guthrie Alexander & Ferdon v. United States Int'l Trade Comm'n, 846 F.2d 1527, 1530 (D.C. Cir. 1988).

[73] 45 U.S.C. § 362(d) (1994).

[74] See Association of Retired R.R. Workers v. United States R.R. Retirement Bd., 830 F.2d 331, 334 (D.C. Cir. 1987); National Ass'n of Retired & Veteran Ry. Employees v. Railroad Retirement Bd., No. 87-117, slip op. at 5 (N.D. Ohio Feb. 20, 1991).

tion Act, governing the disclosure of export licenses and applications,[75] authorizes the withholding of a sufficiently narrow class of information to satisfy the requirements of subpart (B) and thus qualifies as an Exemption 3 statute.[76] Likewise, the Collection and Publication of Foreign Commerce Act,[77] which explicitly provides for nondisclosure of shippers' export declarations, qualifies as an Exemption 3 statute under subpart (B).[78]

The Supreme Court has held that section 102(d)(3) of the National Security Act of 1947,[79] which requires the Director of the CIA to protect "intelligence sources and methods," clearly refers to particular types of matters to be withheld and thus comes within the ambit of subpart (B).[80] Likewise, section 6 of the

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[75] 50 U.S.C. app. § 2411(c)(1) (1994) (statute which expired on August 20, 1994, but has been reextended several times in past, in substantially identical form).

[76] See Armstrong v. Executive Office of the President, No. 89-142, slip op. at 30-35 (D.D.C. July 28, 1995) (protecting information from export license application under Export Administration Act as Exemption 3 statute even though statute had lapsed and its provisions were extended by executive order); Africa Fund v. Mosbacher, No. 92 Civ. 289, slip op. at 14 (S.D.N.Y. May 26, 1993) (holding that Export Administration Act protection applied to agency denial made after Act expired and before subsequent reextension); Lessner v. United States Dep't of Commerce, 827 F.2d 1333, 1336-37 (9th Cir. 1987) (construing statute as effective in 1987).

[77] 13 U.S.C. § 301(g) (1994).

[78] See Africa Fund, No. 92 Civ. 289, slip op. at 13 (S.D.N.Y. May 26, 1993); Young Conservative Found. v. United States Dep't of Commerce, No. 85-3982, slip op. at 8 (D.D.C. Mar. 25, 1987).

[79] 50 U.S.C. § 403-3(c)(5) (1994).

[80] See CIA v. Sims, 471 U.S. 159, 167 (1985); see also Minier v. CIA, 88 F.3d 796, 801 (9th Cir. 1996) (finding that agency properly refused to confirm or deny existence of records concerning deceased person's alleged employment relationship with CIA); Maynard v. CIA, 986 F.2d 547, 554 (1st Cir. 1993) (stating that under § 403(d)(3) it is responsibility of Director of CIA to determine whether sources or methods should be disclosed); Krikorian v. Department of State, 984 F.2d 461, 465 (D.C. Cir. 1993) (same); Fitzgibbon v. CIA, 911 F.2d 755, 761 (D.C. Cir. 1990) (same); Hunt v. CIA, 981 F.2d 1116, 1118 (9th Cir. 1992) (upholding agency's "Glomar" response to request on foreign national, because acknowledgement of any records would reveal sources and methods); Knight v. CIA, 872 F.2d 660, 663 (8th Cir. 1989) (same); Levy v. CIA, No. 95-1276, slip op. at 14-17 (D.D.C. Nov. 16, 1995), aff'd, No. 96-5004 (D.C. Cir. Jan. 15, 1997) (same); Andrade v. CIA, No. 95-1215, 1997 WL 527347, at **3-5 (D.D.C. Aug. 18, 1997) (holding intelligence methods used in assessing employee fitness protectible); Earth Pledge Found. v. CIA, No. 95 Civ. 0257, 1996 WL 694427, at **4-5 (S.D.N.Y. Dec. 4, 1996) (finding agency's "Glomar" response

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Central Intelligence Agency Act of 1949[81]--protecting from disclosure "the organization, functions, names, official titles, salaries or numbers of personnel" employed by the CIA--meets the requirements of subpart (B).[82] Similarly, section 6 of Public Law No. 86-36,[83] pertaining to the organization, functions, activities, and personnel of the NSA, has been held to qualify as a subpart (B) statute,[84] as has 18 U.S.C. § 798(a), which criminalizes the disclosure of any classified information "concerning the nature, preparation, or use of any code, cipher or cryptographic system of the United States."[85] A provision of the Atomic Energy Act, prohibiting the disclosure of "Restricted Data" to the public,[86] refers to particular types of matters and thus has been held to qualify as a subpart (B) statute as well.[87]

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[80](...continued)
proper because acknowledgement of records would generate "danger of revealing sources"); Campbell v. United States Dep't of Justice, No. 89-CV-3016, 1996 WL 554511, at *6 (D.D.C. Sept. 19, 1996) ("CIA director is to be afforded `great deference' by courts determining the propriety of nondisclosure of intelligence sources").

[81] 50 U.S.C. § 403g (1994).

[82] See, e.g., Minier, 88 F.3d at 801; Earth Pledge Found., 1996 WL 694427, at **4-5; Campbell, 1996 WL 554511, at *6; Kronisch v. United States, No. 83-2458, 1995 WL 303625, at **4-6 (S.D.N.Y. May 18, 1995); Hunsberger v. CIA, No. 92-2186, slip op. at 3 (D.D.C. Apr. 5, 1995); Rothschild v. CIA, No. 91-1314, 1992 WL 71393, at *2 (D.D.C. Mar. 25, 1992); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 567 (S.D.N.Y. 1989); Pfeiffer v. CIA, 721 F. Supp. 337, 341-42 (D.D.C. 1989).

[83] 50 U.S.C. § 402 note (1994).

[84] See Founding Church of Scientology v. NSA, 610 F.2d 824, 828 (D.C. Cir. 1979); Hayden v. NSA, 452 F. Supp. 247, 252 (D.D.C. 1978), aff'd, 608 F.2d 1381 (D.C. Cir. 1979). But see Weberman v. NSA, 490 F. Supp. 9, 14-15 (S.D.N.Y. 1980) (confirming or denying existence of intercepted telegram does not reveal information integrally related to specific NSA activity), rev'd on other grounds & remanded, 646 F.2d 563 (2d Cir. 1980).

[85] Winter v. NSA, 569 F. Supp. 545, 548 (S.D. Cal. 1983); see also Gilmore v. NSA, No. C 92-3646, slip op. at 20-21 (N.D. Cal. May 3, 1993) (finding that information on cryptography currently used by NSA "integrally related" to function and activity of intelligence gathering and thus protected).

[86] 42 U.S.C. § 2162 (1994).

[87] See Meeropol v. Smith, No. 75-1121, slip op. at 53-55 (D.D.C. Feb. 29, 1984), aff'd in relevant part & remanded in part sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986). But see General Elec. Co. v. NRC, 750 F.2d 1394, 1401 (7th Cir. 1984) (concluding that provision concerning technical information furnished by license applicants lacked sufficient specificity to qualify as
(continued...)

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Section 7332 of the Veterans Health Administration Patient Rights Statute[88] generally prohibits disclosure of even the abstract fact that medical records on named individuals are maintained pursuant to that section, but it provides specific criteria under which particular medical information may be released, and thus has been found to satisfy the requirements of subpart (B).[89] Records created by the Department of Veterans Affairs as part of a medical quality-assurance program[90] have similarly been held to qualify for Exemption 3 protection.[91] Likewise, one court has suggested that section 5038 of the Juvenile Delinquency Records Statute,[92] which generally prohibits disclosure of the existence of records compiled pursuant to that section, but which does provide specific criteria for releasing the information, qualifies as a subpart (B) statute.[93]

The Court of Appeals for the District of Columbia Circuit has held that a portion of the Patent Act[94] satisfies subpart (B) because it identifies the types of matters--patent applications and information concerning them--intended to be withheld.[95] As well, the portion of the Civil Service Reform Act concerning the confidentiality of certain labor relations training and guidance materials,[96] has been held to qualify as a subpart (B) withholding statute.[97] In addition, the United States Information and Educational Exchange Act of 1948 (the "Smith-Mundt Act")[98] qualifies as a subpart (B) statute insofar as it prohibits the disclosure of United States Information Agency overseas programming materials within the

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[87](...continued)
Exemption 3 statute).

[88] 38 U.S.C. § 7332 (1994).

[89] See Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992).

[90] See 38 U.S.C. § 5705(a) (1994).

[91] See Schulte & Sun-Sentinel Co. v. VA, No. 96-6251, slip op. at 3-4 (S.D. Fla. Feb. 2, 1996).

[92] 18 U.S.C. § 5038 (1994).

[93] See McDonnell v. United States, 4 F.3d 1227, 1251 (3d Cir. 1993) (holding state juvenile delinquency records outside scope of statute).

[94] 35 U.S.C. § 122 (1994).

[95] Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979); accord Leeds v. Quigg, 720 F. Supp. 193, 194 (D.D.C. 1989).

[96] 5 U.S.C. § 7114(b)(4) (1994).

[97] See Dubin v. Department of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981), aff'd, 697 F.2d 1093 (11th Cir. 1983) (unpublished table decision); NTEU v. OPM, No. 76-695, slip op. at 4 (D.D.C. July 9, 1979).

[98] 22 U.S.C. §§ 1461-1a (1994).

United States.[99]

The Commodity Exchange Act,[100] which prohibits the disclosure of business transactions, market positions, trade secrets, or customer names of persons under investigation under the Act, has been held to refer to particular types of matters and thus to satisfy subpart (B).[101] The D.C. Circuit has recently held that a provision of the Federal Aviation Act,[102] relating to security data the disclosure of which would be detrimental to the safety of airline travelers, similarly shields that particular data from disclosure under the FOIA.[103] It also has been held that the DOD's "technical data" statute,[104] which protects technical information with "military or space application" for which an export license is required, satisfies subpart (B) because it refers to sufficiently particular types of matters.[105]

Lastly, the Federal Transfer Technology Act,[106] which allows federal agencies the discretion to protect for five years any commercial and confidential information that results from a cooperative research and development agreement (CRADA) with a nonfederal party, recently has been held to qualify as an Exemption 3 statute.[107] Under a concurrent provision in that Act, the agency also is absolutely prohibited from disclosing any commercial and confidential information obtained from the CRADA's private-sector partner.[108] (See also discussion of Exemption 4, below.)

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[99] See Essential Info. v. USIA, No. 96-1194, slip op. at 3-6 (D.D.C. Nov. 27, 1997) (appeal pending).

[100] 7 U.S.C. § 12 (1994).

[101] See Hunt v. Commodity Futures Trading Comm'n, 484 F. Supp. 47, 49 (D.D.C. 1979).

[102] 49 U.S.C. § 40119 (1994).

[103] Public Citizen, Inc. v. FAA, 988 F.2d 186, 194 (D.C. Cir. 1993).

[104] 10 U.S.C. § 130 (1994).

[105] See Chenkin v. Department of the Army, No. 93-494, slip op. at 7 (E.D. Pa. Jan. 14, 1994), aff'd, 61 F.3d 894 (3d Cir. 1995) (unpublished table decision); Colonial Trading Corp. v. Department of the Navy, 735 F. Supp. 429, 431 (D.D.C. 1990); see also American Friends Serv. Comm. v. DOD, No. 83-4916, slip op. at 10 (E.D. Pa. Sept. 25, 1986), rev'd on other grounds, 831 F.2d 441 (3d Cir. 1987).

[106] 15 U.S.C. § 3710a(c)(7) (1994).

[107] See DeLorme Publ'g Co. v. NOAA, 917 F. Supp. 867, 871 (D. Me. 1996), appeal dismissed per stipulation, No. 96-1601 (1st Cir. July 8, 1996).

[108] 15 U.S.C. § 3710a(c)(7)(B).

EXEMPTION 3

Alternative Analyses

Some statutes have been found to satisfy both Exemption 3 subparts. For example, while the Court of Appeals for the Third Circuit has held that section 222(f) of the Immigration and Nationality Act[109] sufficiently limits the category of information it covers--records pertaining to the issuance or refusal of visas and permits to enter the United States--to qualify as an Exemption 3 statute under subpart (B),[110] the Court of Appeals for the District of Columbia Circuit has specifically held that the section satisfies subpart (A) as well as subpart (B).[111]

Similarly, Exemption 3 protection for information obtained by law enforcement agencies pursuant to court-ordered wiretaps[112] has been recognized by district courts on a variety of bases.[113] However, in Lam Lek Chong v. DEA,[114] the D.C. Circuit, finding that "on its face, Title III clearly identifies intercepted communications as the subject of its disclosure limitations," held that "Title III falls squarely within the scope of subsection (B)'s second prong, as a statute referring to particular matters to be withheld."[115] Recently, "pen register"

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[109] 8 U.S.C. § 1202(f) (1994).

[110] DeLaurentiis v. Haig, 686 F.2d 192, 194 (3d Cir. 1982); accord Smith v. Department of Justice, No. 81-CV-813, slip op. at 10-11 (N.D.N.Y. Dec. 13, 1983) .

[111] Medina-Hincapie v. Department of State, 700 F.2d 737, 741-42 (D.C. Cir. 1983); accord Marulanda v. United States Dep't of State, No. 93-1327, slip op. at 4-6 (D.D.C. Jan. 31, 1996) (protecting documents relating to denial of plaintiff's visa even when agency previously released certain of those records that were determined not to breach confidentiality provision).

[112] 18 U.S.C. §§ 2510-2520 (1994).

[113] See Gonzalez v. United States Dep't of Justice, No. 88-913, slip op. at 3-4 (D.D.C. Oct. 25, 1988) (holding that 18 U.S.C. § 2511(2)(a)(ii), which regulates disclosure of existence of wiretap intercepts, meets requirements of subpart (A)); Docal v. Bennsinger, 543 F. Supp. 38, 43-44 (M.D. Pa. 1981) (relying upon entire statutory scheme of Title III, 18 U.S.C. §§ 2510-2520, but not distinguishing between Exemption 3 subparts); Carroll v. United States Dep't of Justice, No. 76-2038, slip op. at 2-3 (D.D.C. May 26, 1978) (holding that 18 U.S.C. § 2518(8), which regulates disclosure of contents of wiretap intercepts, meets requirements of subpart (A)).

[114] 929 F.2d 729 (D.C. Cir. 1991).

[115] Id. at 733; see also Payne v. United States Dep't of Justice, No. 96-30840, slip op. at 5-6 (5th Cir. July 11, 1997) (holding that tape recordings obtained pursuant to Title III "fall squarely" within scope of Exemption 3); Delviscovo v. FBI, 903 F. Supp. 1, 2 (D.D.C. 1995) (protecting "information relating to the lawful interception of communications"); Manna v. United States Dep't of Justice, No. 92-1840, slip op. at 3-4 (D.N.J. Aug. 25, 1993) (determining that analysis of

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applications and orders, obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, mistakenly have been held to be protected from disclosure by a provision of that statute,[116] and have been incorrectly found to fall under Exemption 3.[117] It should be noted that while "pen register" orders may be properly withheld pursuant to a sealing order issued by a court in accordance with the statute,[118] once the sealing order is lifted, the statute no longer prohibits release under the FOIA.[119]

The withholding of tax return information has been approved under three different theories. The United States Supreme Court and most appellate courts to have considered the matter have held either explicitly or implicitly that § 6103 of the Internal Revenue Code[120] satisfies subpart (B) of Exemption 3.[121] The Courts of Appeals for the D.C., Fifth, Sixth, and Tenth Circuits have further reasoned that § 6103 is a subpart (A) statute to the extent that a person is not entitled to

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[115](...continued)
audio tapes and identities of individuals conversing on tapes obtained pursuant to Title III is protected under Exemption 3), aff'd on other grounds, 51 F.3d 1158 (3d Cir.), cert. denied, 116 S. Ct. 477 (1995); Manchester v. DEA, 823 F. Supp. 1259, 1267 (E.D. Pa. 1993) (wiretap applications and derivative information fall within broad purview of Title III statute).

[116] 18 U.S.C. § 3123(d) (1994).

[117] McFarland v. DEA, No. 94-620, slip op. at 4 (D. Colo. Jan. 3, 1995) (mistakenly protecting material "acquired through the use of a pen register" under Exemption 3).

[118] See 18 U.S.C. § 3123(d)(1); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 812 (D.N.J. 1993) (protecting under Exemption 3 sealed pen register applications and orders), aff'd on other grounds, 51 F.3d 1158 (3d Cir.), cert. denied, 116 S. Ct. 477 (1995).

[119] See 18 U.S.C. § 3123(d). See generally Morgan v. United States Dep't of Justice, 923 F.2d 195, 199 (D.C. Cir. 1991) ("[T]he proper test for determining whether an agency improperly withholds records under seal is whether the seal like an injunction, prohibits the agency from disclosing the records.").

[120] 26 U.S.C. § 6103 (1994).

[121] See, e.g., Church of Scientology v. IRS, 484 U.S. 9, 15 (1987); Aronson v. IRS, 973 F.2d 962, 964-65 (1st Cir. 1992) (finding that IRS lawfully exercised discretion to withhold street addresses pursuant to 26 U.S.C. § 6103(m)(1)); Long v. IRS, 891 F.2d 222, 224 (9th Cir. 1989) (holding that deletion of taxpayers' identification does not alter confidentiality of § 6103 information); DeSalvo v. IRS, 861 F.2d 1217, 1221 (10th Cir. 1988); Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986); Long v. IRS, 742 F.2d 1173, 1179 (9th Cir. 1984); Ryan v. ATF, 715 F.2d 644, 645 (D.C. Cir. 1983); Currie v. IRS, 704 F.2d 523, 527-28 (11th Cir. 1983); Willamette Indus. v. United States, 689 F.2d 865, 867 (9th Cir. 1982); Barney v. IRS, 618 F.2d 1268, 1274 n.15 (8th Cir. 1980) (dictum); Chamberlain v. Kurtz, 589 F.2d 827, 843 (5th Cir. 1979).

access to tax returns or return information of other taxpayers.[122] It should be noted that pursuant to § 6103(b)(2), individuals are not entitled to obtain tax return information even regarding themselves if it is determined that release would impair enforcement by the IRS.[123] Information which would provide insights into how the IRS selects returns for audits has regularly been found to impair IRS's enforcement of tax laws.[124] Of course, it also must be remembered

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[122] D.C. Circuit: Stebbins v. Sullivan, No. 90-5361, slip op. at 1 (D.C. Cir. July 22, 1992); Fifth Circuit: Linsteadt v. IRS, 729 F.2d 998, 1000 (5th Cir. 1984); Sixth Circuit: Fruehauf Corp. v. IRS, 566 F.2d 574, 578 n.6 (6th Cir. 1977); Tenth Circuit: DeSalvo, 861 F.2d at 1221 n.4. See generally Tax Analysts v. IRS, 117 F.3d 607, 611 (D.C. Cir. 1997) (holding that while Field Service Advice Memoranda contain some protectible "return information," they do not themselves constitute "return information" properly withholdable in their entireties under Exemption 3); Kamman v. IRS, 56 F.3d. 46, 49 (9th Cir. 1995) (appraisal of jewelry seized from third-party taxpayer and auctioned to satisfy tax liability held not "return information"); Crooker v. IRS, No. 94-0755, 1995 WL 430605, at *3 (D.D.C. Apr. 27, 1995) (requiring IRS to confirm that redactions were not taken for aliases plaintiff used in his tax-refund scheme); Tanoue v. IRS, 904 F. Supp. 1161, 1167 (D. Haw. 1995) (protecting third-party "return information," including plaintiff's own statements, since focus is on individual to whom information pertains); Gray, Plant, Mooty, Mooty & Bennett v. IRS, No. 4-90-210, slip op. at 7 (D. Minn. Dec. 18, 1990) (ordering public report released because it does not qualify as "return information" as it does not include data in form which can be associated with particular taxpayer).

[123] See Holbrook v. IRS, 914 F. Supp. 314, 316-17 (S.D. Iowa 1996) (holding that IRS agent's handwritten notes protectible because disclosure would interfere with enforcement proceedings and hence seriously impair tax administration); Pully v. IRS, 939 F. Supp. 429, 434-36 (E.D. Va. 1996) (holding documents relating to civil and criminal investigation of plaintiff protectible under Exemptions 3 and 7(A)); Fritz v. IRS, 862 F. Supp. 234, 236 (W.D. Wis. 1994) (finding that disclosure of name and address of purchaser of seized automobile would impair tax administration as "people would be less likely to purchase seized property" if their identities were revealed); Rollins v. United States Dep't of Justice, No. 90-3170, slip op. at 11 (S.D. Tex. June 30, 1992) (stating that IRS memoranda revealing scope and direction of investigation properly withheld); Starkey v. IRS, No. 91-20040, slip op. at 5 (N.D. Cal. Dec. 6, 1991) (same); Church of Scientology v. IRS, No. 89-5894, slip op. at 3 (C.D. Cal. Mar. 3, 1991) (concluding that release of document referring to information obtainable under various treaties would chill future cooperation of foreign governments and tax-treaty partners); Casa Investors, Ltd. v. Gibbs, No. 88-2485, slip op. at 5-6 (D.D.C. Oct. 11, 1990) (holding that recommendation for settlement of tax controversies prepared by low-level IRS employees requires protection). But see LeMaine v. IRS, No. 89-2914, slip op. at 12 (D. Mass. Dec. 10, 1991) (deciding that release of information commonly revealed to public in tax enforcement proceedings would not "seriously impair Federal tax administration" overall).

[124] See Gillin v. IRS, 980 F.2d 819, 822 (1st Cir. 1992) (per curiam) (holding (continued...)

that § 6103 applies only to tax return information obtained by the Department of the Treasury, not to such information maintained by other agencies which was obtained by means other than through the provisions of the Internal Revenue Code.[125]

At least one court of appeals and several district courts have explicitly embraced a third theory based upon the reasoning of Zale Corp. v. IRS.[126] These courts have held that it is not necessary to view § 6103 as an Exemption 3 statute in order to withhold tax return information because the provisions of this tax code section are intended to operate as the sole standard governing the disclosure or nondisclosure of such information, thereby "displacing" the FOIA.[127]

Viewing § 6103 as a "displacement" statute permits the courts to avoid the de novo review required by the FOIA and to apply instead less stringent standards of review pursuant to the Administrative Procedure Act,[128] and can relieve agencies from certain procedural requirements of the FOIA, such as the time limitations for responding to requests and the duty to segregate and release nonexempt information.[129] Nevertheless, even under this approach the gov

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[124](...continued)
that differential function scores, used to identify returns most in need of examination or audit, are exempt from disclosure); Long v. IRS, 891 F.2d at 224 (finding that computer tapes used to develop discriminant function formulas protected); Inman v. Commissioner, 871 F. Supp. 1275, 1278 (E.D. Cal. 1994) (ruling that discriminant function scores properly exempt); Lamb v. IRS, 871 F. Supp. 301, 304 (E.D. Mich. 1994) (same); In re Church of Scientology Flag Serv. Org./IRS FOIA Litigation, No. 91-423, slip op. at 3-4 (M.D. Fla. May 19, 1993) (determining that "tolerance criteria" and discriminant function scores properly withheld) (multidistrict litigation case); Small v. IRS, 820 F. Supp. 163, 165-66 (D.N.J. 1992) (holding that discriminant function scores protected under both Exemption 3 and Exemption 7(E)); Ferguson v. IRS, No. C-89-4048, slip op. at 4 (N.D. Cal. Oct. 31, 1990) (finding that standards and data used in selection and examination of returns are exempt from disclosure where they would impair IRS enforcement).

[125] See FOIA Update, Spring 1988, at 5.

[126] 481 F. Supp. 486, 490 (D.D.C. 1979).

[127] See, e.g., Cheek v. IRS, 703 F.2d 271, 271 (7th Cir. 1983) (noting that § 6103 also "displaces" Privacy Act of 1974); King v. IRS, 688 F.2d 488, 495 (7th Cir. 1982); Kuzma v. IRS, No. 81-600E, slip op. at 7-8 (W.D.N.Y. Dec. 31, 1984); Hosner v. IRS, 3 Gov't Disclosure Serv. (P-H) ¶ 83,164, at 83,816 (D.D.C. Mar. 31, 1983); Hulsey v. IRS, 497 F. Supp. 617, 618 (N.D. Tex. 1980); see also White v. IRS, 707 F.2d 897, 900 (6th Cir. 1983) (indicating approval of Zale).

[128] 5 U.S.C. §§ 701-706 (1994).

[129] See Grasso, 785 F.2d at 73-74; White, 707 F.2d at 900; Goldsborough v. IRS, No. Y-81-1939, slip op. at 12 (D. Md. May 10, 1984); Green v. IRS, 556 F.
(continued...)

ernment may be required to provide detailed Vaughn Indexes of the information being withheld, rather than general affidavits; the Sixth Circuit required this despite the fact that the court below had relied solely on the "displacement" theory for its decision.[130]

However, other courts have specifically refused to adopt this "displacement" analysis on the ground that to do so, once it is already evident that § 6103 is an Exemption 3 statute, "would be an exercise in judicial futility [requiring district courts] to engage in both FOIA and Zale analyses when confronted" with such cases.[131] Most significantly, the D.C. Circuit in 1986 squarely rejected the "displacement" argument on the basis that the procedures in § 6103 for members of the public to obtain access to IRS documents do not duplicate, and thus do not "displace," those of the FOIA.[132]

The D.C. Circuit's rejection of the "displacement" theory in relation to § 6103 is consistent with previous D.C. Circuit decisions involving similar "displacement" arguments. For example, it had previously rejected a "displacement" argument involving the Department of State's Emergency Fund statutes[133] when it held that inasmuch as Exemption 3 is not satisfied by these statutes, information cannot be withheld pursuant to them, even though they were enacted after the FOIA.[134]

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[129](...continued)
Supp. 79, 84 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984) (unpublished table decision); Meyer v. Department of the Treasury, 82-2 U.S. Tax Cas. (CCH) ¶ 9678, at 85,448 (W.D. Mich. Oct. 2, 1982).

[130] Osborn v. IRS, 754 F.2d 195, 197-98 (6th Cir. 1985).

[131] Currie, 704 F.2d at 528; accord Grasso, 785 F.2d at 74; Long, 742 F.2d at 1177 (also rejecting section 701 of Economic Recovery Tax Act, 26 U.S.C. § 6103(b)(2) (1994), as "displacement" statute); Linsteadt, 729 F.2d at 1001-02; see also Britt v. IRS, 547 F. Supp. 808, 813 (D.D.C. 1982); Tigar & Buffone v. CIA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,172, at 81,461 (D.D.C. Feb. 23, 1981).

[132] Church of Scientology v. IRS, 792 F.2d 146, 148-50 (D.C. Cir. 1986).

[133] 22 U.S.C. § 2671 (1994); 31 U.S.C. § 107 (1994).

[134] See Washington Post Co. v. United States Dep't of State, 685 F.2d 698, 703-04 & n.9 (D.C. Cir. 1982), cert. granted, 464 U.S. 812, vacated & remanded, 464 U.S. 979 (1983). (After the Supreme Court granted the government's petition for certiorari, the Washington Post Company withdrew its FOIA request, which had the procedural effect of nullifying the D.C. Circuit's decision. Thus, the Supreme Court has never substantively reviewed this issue.) See also FOIA Update, Fall 1983, at 11; cf. United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 153-54 (1989) (holding that FOIA, not 28 U.S.C. § 1914 (1994), governs disclosure of court records in possession of government agencies); Paisley v. CIA, 712 F.2d 686, 697 (D.C. Cir. 1983) (stating that FOIA, not Speech or Debate Clause, is definitive word on disclosure of information within govern-
(continued...)

Yet the D.C. Circuit has held that the procedures of the Presidential Recordings and Materials Preservation Act[135] exclusively govern the disclosure of transcripts of the tape recordings of President Nixon's White House conversations, based upon that Act's comprehensive, carefully tailored procedure for releasing Presidential materials to the public.[136] Thus, the "displacement" theory may still be advanced for statutes which provide procedures for the release of information to the public that, in essence, duplicate the procedures provided by the FOIA,[137] or for statutes that comprehensively override the FOIA's access scheme.[138] In this connection, it should be noted that the FOIA's specific fee provision referring to other statutes that set fees for particular types of records[139] has the effect of causing those statutes to "displace" the FOIA's basic fee provisions.[140] (For a further discussion of this point, see Fees and Fee Waivers, below.)

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[134](...continued)
ment's possession); Church of Scientology v. United States Postal Serv., 633 F.2d 1327, 1333 (9th Cir. 1980) (finding that postal statute does not displace more detailed and later-enacted FOIA absent specific indication of congressional intent to the contrary).

[135] 44 U.S.C. § 2111 (1994).

[136] Ricchio v. Kline, 773 F.2d 1389, 1395 (D.C. Cir. 1985); cf. Katz v. National Archives & Records Admin., 68 F.3d 1438, 1440-42 (D.C. Cir. 1995) (holding certain President John F. Kennedy autopsy material to be personal presidential papers not subject to FOIA).

[137] See Church of Scientology, 792 F.2d at 149 (dictum).

[138] See Ricchio, 773 F.2d at 1395; cf. SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1120 (9th Cir. 1976) (reaching "displacement-type" result for records governed by National Library of Medicine Act, 42 U.S.C. § 275 (1994)); Jones v. OSHA, No. 94-3225, slip op. at 7 (W.D. Mo. June 6, 1995) (requiring release of employee complaints as Occupational Safety and Health Act provided for disclosure, and agency could not otherwise withhold under FOIA); Gersh & Danielson v. EPA, 871 F. Supp. 407, 410 (D. Colo. 1994) (holding FOIA exemptions inapplicable where in conflict with specific disclosure provisions of Clean Water Act); FOIA Update, Fall 1990, at 7-8 n.32. But cf. Minier v. CIA, 88 F.3d 796, 802 (9th Cir. 1996) ("[T]he JFK Act [President John F. Kennedy Assassination Records Collection Act, 44 U.S.C. § 2107 (1994)], by its own terms, is an entirely separate scheme from the FOIA"; however, "there is nothing to suggest that Congress intended the JFK Act to override the CIA's ability to claim proper FOIA exemptions." (citing Assassination Archives & Research Ctr. v. United States Dep't of Justice, 43 F.3d 1542, 1544 (D.C. Cir. 1995))).

[139] 5 U.S.C. § 552(a)(4)(A)(vi) (1994).

[140] See Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,011 (1987) (implementing 5 U.S.C. § 552(a)(4)(A)(vi)).

Additional Considerations

Certain statutes fail to meet the requisites of either Exemption 3 prong. For instance, the Court of Appeals for the District of Columbia Circuit, in holding that provisions governing the FBI's sharing of "rap sheets"[141] do not qualify as an Exemption 3 statute because they do not expressly prohibit the disclosure of "rap sheets," explained that even if the provisions met the exemption's threshold requirement, they would not qualify as an Exemption 3 statute as they fail to satisfy either of its subparts.[142] Likewise, the Copyright Act of 1976[143] has been held to satisfy neither Exemption 3 subpart because rather than prohibiting disclosure, it specifically permits public inspection of copyrighted documents.[144]

It has also been held that section 360j(h) of the Medical Device Amendments of 1976[145] is not an Exemption 3 statute because it does not specifically prohibit disclosure of records,[146] nor is section 410(c)(6) of the Postal Reorganization Act[147] because the broad discretion afforded the Postal Service to release or withhold records is not sufficiently specific.[148] Similarly, section 1106 of the Social Security Act[149] is not an Exemption 3 statute because it gives the Secretary of Health and Human Services wide discretion to enact regulations specifically permitting disclosure.[150] The Federal Insecticide, Fungicide, and Rodenticide

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[141] 28 U.S.C. § 534 (1994).

[142] Reporters Comm. for Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730, 736 n.9 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989).

[143] 17 U.S.C. § 705(b) (1994).

[144] See St. Paul's Benevolent Educ. & Missionary Inst. v. United States, 506 F. Supp. 822, 830 (N.D. Ga. 1980); see also FOIA Update, Fall 1983, at 3-5 ("OIP Guidance: Copyrighted Materials and the FOIA") (emphasizing that Copyright Act should not be treated as Exemption 3 statute under FOIA and that copyrighted records should be processed under Exemption 4 instead).

[145] 21 U.S.C. § 360j(h) (1994).

[146] See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1286 (D.C. Cir. 1983).

[147] 39 U.S.C. § 410(c)(6) (1994).

[148] See Church of Scientology v. United States Postal Serv., 633 F.2d 1327, 1333 (9th Cir. 1980).

[149] 42 U.S.C. § 1306 (1994).

[150] See Robbins v. HHS, No. 95-cv-3258, slip op. at 3-4 (N.D. Ga. Aug. 13, 1996), aff'd per curiam, No. 96-9000 (11th Cir. July 8, 1997).

Act[151] also does not satisfy either prong of Exemption 3 as the withholding of certain information is entirely discretionary under that Act.[152]

A particularly difficult Exemption 3 issue was finally put to rest by the Supreme Court in 1988. In analyzing the applicability of Exemption 3 to the Parole Commission and Reorganization Act[153] and Rule 32 of the Federal Rules of Criminal Procedure, each of which governs the disclosure of presentence reports, the Supreme Court decisively held that they are Exemption 3 statutes only in part.[154] The Court found that they do not permit the withholding of an entire presentence report, but rather only those portions of a presentence report pertaining to a probation officer's sentencing recommendations, certain

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[151] 7 U.S.C. § 136h(d) (1994).

[152] See Northwest Coalition for Alternatives to Pesticides v. Browner, 941 F. Supp. 197, 201 (D.D.C. 1996).

[153] 18 U.S.C. § 4208 (1994) (repealed as to offenses committed after November 1, 1987).

[154] United States Dep't of Justice v. Julian, 486 U.S. 1, 9 (1988).